IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STEPHANIE MARIE LYON, Petitioner, v. HON. HOWARD FELL, Judge Pro Tempore of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and THE STATE OF ARIZONA, Real Party in Interest.	2 CA-SA 2008-0015 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20073550

JURISDICTION ACCEPTED; RELIEF GRANTED

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V Á S Q U E Z, Judge.

¶1 In this special action, petitioner Stephanie Lyon, the defendant in the underlying criminal proceeding, challenges the respondent judge's order on appeal from the Tucson City Court, dismissing her conviction for driving with a blood alcohol concentration (BAC) of .08 or more, in violation of A.R.S. § 28-1381(A)(2), but affirming her conviction for driving while under the influence of an intoxicant (DUI) and impaired to the slightest degree, in violation of § 28-1381(A)(1). Lyon contends that, having correctly found her due process rights had been violated, the respondent judge should have reversed the conviction under subsection (A)(1). Alternatively, she maintains she is entitled to a new trial on that charge, at which the state should not be permitted to introduce the results of two breath tests administered by a police officer. We accept jurisdiction of this special action because the appeal in which the respondent entered judgment arose from convictions in Tucson City Court and Lyon has no further remedy by appeal. *See* A.R.S. § 22-375. Because we find the respondent judge abused his discretion, we grant relief. *See* Ariz. R. P. Spec. Actions 3(c) (among "only questions that may be raised in a special action" is "[w]hether a determination was . . . an abuse of discretion").

¶2 In his order of February 26, 2008, the respondent judge set forth a history of this case that is supported by the record provided us and not disputed by the parties. In relevant part, that history is as follows. Tucson police officer Bobby Nielsen stopped Lyon after she drove north on Fourth Avenue and made a wide right turn onto Speedway. Based on observations he had made while talking to her and his experience as a law enforcement

officer, he suspected she had been drinking alcohol. At Nielsen's direction, Lyon performed field sobriety tests. Nielsen then conducted a preliminary field test to determine the presence of alcohol in Lyon's blood based on her breath; the test was positive. He informed Lyon that she had the right to an independent test to determine her BAC and that she would be given the opportunity to obtain such a test at her own expense. Tucson police officer George Eppley then arrived to assist Nielsen.

¶3 As the respondent judge noted in his February 2008 order, Eppley administered two breath tests using the Intoxilyzer 5000: the first one at 1:33 a.m. and the second at 1:43 a.m. Eppley had attempted to administer the second test at 1:41 a.m., but it was interrupted by radio frequency interference and could not be completed. Lyon moved to preclude the state from introducing the results of the breath tests at trial on the ground that, in administering the tests, Eppley had not complied with applicable regulations of the Department of Health Services (DHS) requiring two consecutive breath tests within the specified interval of five to ten minutes. After an evidentiary hearing, the city court magistrate found the state had failed to comply with the DHS regulations and precluded the presumptive admission of the test results pursuant to A.R.S. § 28-1323(A)(1) and (3). Pursuant to *Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979), Lyon subsequently requested that the state provide her with a sample of her breath for independent testing, but the state responded that no such sample existed.

¶4 Relying primarily on this court's decision in *State v. Sanchez*, 192 Ariz. 454, 967 P.2d 129 (App. 1998), Lyon moved to dismiss the charges, arguing that her due process rights had been violated by the state's failure to follow the DHS regulations and its failure to provide her with a sample of her breath for independent testing. Finding the state was not required to provide Lyon with the sample, the city magistrate denied the motion. The magistrate also permitted the state to introduce the results of the breath tests at the ensuing bench trial, after the state had established foundation for the results through expert testimony. The magistrate found Lyon guilty of both charges.

¶5 On appeal to the superior court, Lyon contended the magistrate had erred when he found her due process rights had not been violated and when he allowed the state to introduce the breath test results. The respondent judge agreed with Lyon that the state had violated her due process rights and reversed the conviction under § 28-1381(A)(2). But, finding the magistrate correctly had permitted the state to introduce the breath test results, the respondent affirmed Lyon's conviction under § 28-1381(A)(1).

Discussion

¶6 In her petition for special action relief, Lyon contends the respondent judge erred when, after finding a violation of her due process rights justifying dismissal of the charge under subsection (A)(2), he nevertheless concluded simultaneously that the city magistrate had properly allowed the state to introduce the breath test results and affirmed her conviction under subsection (A)(1). In its response to the petition, the state contends the

respondent judge erred when he found Lyon's due process rights had been violated. The state argues that if we choose to accept jurisdiction of this special action, "intervention should be solely to remedy the injury to the State." Thus, the state is essentially requesting that we find the respondent judge acted arbitrarily and capriciously by finding Lyon's due process rights were violated.

¶7 Contrary to our dissenting colleague's suggestion, we have not been provided a sufficient record to support such a conclusion. Indeed the state has failed to provide us with the record of the very evidentiary hearing at which Lyon urged that her due process rights had been violated and which presumably formed, at least in part, the basis of the respondent judge's ultimate ruling. To the extent there may exist additional portions of the record before either the respondent or the magistrate that could establish the respondent's conclusion is erroneous, it was the state's burden to provide us with it. *See* Ariz. R. P. Spec. Actions 7(e) (response to petition shall, if necessary, include appendix containing "documents in the record on appeal that are necessary for a determination of the issues raised by the petition which are not contained in the petitioner's appendix"). Because the respondent judge reached a conclusion that the state seeks to challenge on a mixed issue of fact and law, we must presume the missing factual record supports his finding that Lyon's due process rights were violated.[1] Furthermore, to the extent the state is actually asking this

[1]In so stating, we recognize that the respondent judge had a duty to defer to the city magistrate's factual findings, and the record suggests that it did so. But, in the absence of the complete record of the magistrate's specific factual findings at the relevant due process

court to reverse or vacate that portion of the respondent's order finding Lyon's due process rights have been violated, we question whether we could consider this argument at all in the absence of a cross-petition by the state. *See State ex. rel Thomas v. Contes*, 216 Ariz. 525, n.3, 169 P.3d 115, 117 n.3 (App. 2007) (in state's petition for special action, declining to consider defendant's argument on separate but related issue where defendant failed to file cross-petition challenging the court's ruling on that issue).

¶8 Moreover, as discussed below, the record with which we have been provided, including the trial testimony of the state's expert witness, supports the respondent judge's ruling that Lyon's due process rights were violated. But because the dissent addresses this issue on the merits and some of the principles are relevant to our determination of the appropriate remedy for the due process violation, we address the general issue of due process in DUI cases.

Due Process

¶9 In *Mack v. Cruikshank*, this court reviewed the evolution of the statutes and case law governing the testing of blood and breath to determine a person's BAC in DUI prosecutions and defendants' rights to challenge the accuracy of such evidence. 196 Ariz.

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hearing, we simply do not know what facts the respondent judge deferred to—and which presumably formed the basis for the respondent judge's ultimate conclusion that Lyon's due process rights were violated. Relying on the parties' briefs, the dissent assumes that the evidentiary hearing contains no additional facts relevant to our discussion beyond those elicited at trial. Given the factually intensive nature of the dissent's challenge to the respondent judge's ruling, and the deference we owe to the respondent judge before characterizing its ruling as "arbitrary and capricious," we do not believe the gap in the record can be so easily overlooked.

541, ¶¶ 11-15, 2 P.3d 100, 104-05 (App. 1999). As we noted, in the earlier cases, the state had been required to preserve the breath ampoule it tests. *Id.* ¶ 13; *see Scales v. City Court of Mesa*, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979). And in *Baca*, our supreme court held that due process required the state to preserve a second sample of breath when the testing process destroys the test sample obtained. 124 Ariz. at 356, 604 P.2d at 620. But in *Moss v. Superior Court*, 175 Ariz. 348, 353, 857 P.2d 400, 405 (App. 1993), Division One of this court held that the 1992 amendment of the DUI statute, formerly A.R.S. § 28-692, to eliminate the requirement that a DUI suspect be provided a sample of breath for independent testing "when replicate tests on an Intoxilyzer 5000 are employed as prescribed by the DHS and DPS [Department of Public Safety] regulations," did not violate a suspect's due process rights under the state or federal constitutions. *Accord State v. Rodriguez*, 173 Ariz. 450, 455, 844 P.2d 617, 622 (App. 1992). The court reasoned in *Moss* that the accuracy and reliability of the Intoxilyzer 5000, coupled with the statutory requirement of replicate tests and the requirement under DHS regulations that there be "duplicate" testing, virtually assured the test results would be accurate and the defendant would not be deprived of potentially exculpatory evidence. 175 Ariz. at 353, 857 P.2d at 405.

¶10 DPS is responsible for promulgating and enforcing regulations that govern alcohol testing and for prescribing a protocol designed to ensure the accuracy, reliability, and uniformity of the testing process.[2] *See* A.R.S. § 28-1324 (requiring DPS to "adopt rules

[2]The responsibility for promulgating such rules previously had been assigned to DHS. When the statute was renumbered in 1996, *see* 1996 Ariz. Sess. Laws, ch. 76, § 3, and

prescribing methods and procedures for the administration of breath tests to determine [blood] alcohol concentration" and specifying aspects of testing process to be covered by such rules); A.R.S. § 41-1713(A)(9) (authorizing DPS to "[a]dopt and administer the breath, blood or other bodily substances test rules pursuant to title 28, chapter 4"); *State v. Duber*, 187 Ariz. 425, 428, 930 P.2d 502, 505 (App. 1996) (finding former A.R.S. § 28-695(D) required DHS to adopt rules for "approving quantitative breath testing devices, establishing the qualifications of persons who conduct tests, and ensuring the accuracy of the test results obtained from approved devices"); *see also* § 28-1323(A)(1), (3) (providing for admissibility of breath test results if "[d]uplicate tests were administered and the test results were within 0.02 [blood] alcohol concentration of each other or an operator observed the person charged with the violation for twenty minutes immediately preceding the administration of the test"; if test performed "using a quantitative breath testing device approved by" DHS or DPS; and if DHS or DPS checklist followed).

¶11 Regulation 13-10-103, Ariz. Admin. Code, pertains to breath-testing devices and formally approves of the Intoxilyzer 5000 among the machines that may be used to determine a person's BAC. Regulation 13-10-104 governs testing procedures and provides in subsection C that "[d]uplicate breath tests shall be administered at intervals of not less than five minutes nor more than 10 minutes." Similarly, the term "duplicate breath tests" is

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amended in 2003, *see* 2003 Ariz. Sess. Laws, ch. 213, §§ 4, 10, it transferred to DPS the responsibility for administering and enforcing existing DHS regulations and adopting new rules.

defined in R13-10-101(11) as "two consecutive breath tests that immediately follow a deprivation period, agree within 0.020 [B]AC of each other, and are conducted at least five and no more than 10 minutes apart." *See also State ex rel. Dean v. City Court of Tucson*, 163 Ariz. 510, 511 n.2, 789 P.2d 180, 181 n.2 (1990) ("Replicate breath testing is a series of two consecutive breath tests spaced by air blanks to flush out the sample chambers. A reading is taken of each of the two samples and the variance between the two samples must be within .02 percent for the test to be valid."). The purpose of the regulations is to assure uniformity and reliability of the testing process. *See Fuenning v. Superior Court*, 139 Ariz. 590, 602, 680 P.2d 121, 133 (1983).

¶12 Here, the city magistrate apparently found that breath tests were not obtained in compliance with the applicable regulations, and the respondent judge agreed. So, too, do we, based on the available record. The tests were not truly consecutive, given the aborted test performed between the two that were successfully administered. The evidence did not establish the two completed tests had been administered no more than ten minutes apart. Rather, it showed the tests could have been administered as much as ten minutes and fifty-nine seconds apart. And at trial, the state's own expert testified that the breath tests administered in this case "do not meet th[e] definition of duplicate breath tests, as defined in the regulations." When asked if she would "agree . . . this test bears no resemblance" to the DHS and DPS regulations, she responded, "As far as the regulations go, I agree with you on that."

¶13 In its response to the petition for special action, the state does not dispute that the breath tests were not administered in accordance with the relevant statutes and regulations. Rather, the state primarily contends the respondent judge correctly affirmed the city magistrate's admission of the evidence of Lyon's BAC, despite the lack of compliance with the regulations because the instrument used was "reasonably reliable." Consequently, the state argues, although the lack of compliance meant the test results could not automatically be admitted into evidence pursuant to § 28-1323, the city magistrate properly gave the state the opportunity to establish an independent foundation for admitting the test results, thereby satisfying any due process concerns and justifying the admission of the evidence of Lyon's BAC after that foundation was established.

¶14 But the state overlooks that test results acquired in violation of our state's due process standards are not inadmissible because a violation of those standards necessarily renders the results unreliable. Rather, those results are inadmissible because (1) the defendant was denied the opportunity to conduct an independent test of the inculpatory breath sample and (2) the state has failed to fully comply with the heightened requirements for admitting a test result when generated by equipment that does not create a sample for independent testing. *See Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986) (Due Process Clause of Arizona Constitution requires that suspects in DUI cases "be afforded meaningful access to objective scientific evidence of sobriety"); *see also Moss*, 175 Ariz. at 354, 857 P.2d at 406 (relieving state of pre-existing duty to preserve breath samples

for defendant's own testing "in light of the technological safeguards incorporated into the Intoxilyzer 5000 machine *and the DHS testing procedures under the Arizona statutes*") (emphasis added). And contrary to the dissent's suggestion, relying on *State v. Velasco*, 165 Ariz. 480, 485, 799 P.2d 821, 826 (1990), it is not the sophistication of the Intoxilyzer 5000 standing alone that diminishes the potentially exculpatory value of an independent breath sample, it is "the[internal] safeguards, *plus the regulatory safeguards*," that render the Intoxilyzer results "extremely accurate." (Emphasis added.) *See also Moss*, 175 Ariz. at 353, 354, 857 P.2d at 405, 406 (repeatedly discussing safeguards set forth in statute and DHS regulations in addressing due process concerns raised by use of Intoxilyzer 5000 results in DUI cases). Thus, the due process violation here arises not from the state's failure to provide sufficient foundation that the result is reliable but from Lyon's inability to either verify or contest that conclusion by subjecting the inculpatory breath sample to her own, independent scientific analysis.

¶15 Our dissenting colleague maintains we trivialize Arizona's Due Process Clause when we insist, in conformity with our due process jurisprudence, that the state comply with the specific requirements of the regulations and the statutes adopted by our legislature for the admissibility of breath test results. But we are obliged to give such regulations our deference and read them in a "fair and sensible" manner. *See State v. Superior Court*, 195 Ariz. 555, ¶ 13, 991 P.2d 258, 262 (App. 1999); *see also Fuenning*, 139 Ariz. at 602, 680 P.2d at 133 (legislative goal in promulgating regulations for admissibility of breath test results includes

statewide uniformity; that goal thwarted if test results admitted under differing standards of "accuracy and reliability"). Both those regulations and our case law discussing them emphasize the importance of duplicate testing as a prerequisite for dispensing with the state's presumptive duty to preserve a sample for the defendant's use. *See, e.g., Moss*, 175 Ariz. at 353, 857 P.2d at 405 ("The state presented evidence to show that when duplicate tests are conducted according to the testing protocol established by DPS regulations and the statutes—that is, consecutive . . . tests administered five to ten minutes apart with .020 or better agreement—'virtually any chance of contamination by mouth alcohol' is eliminated."); A.R.S. § 28-1323(A)(3), (4) (breath tests admissible if duplicate tests administered according to DPS requirements). Given that emphasis, we cannot agree that two deviations from the duplicate testing protocol set forth in the regulations—that the duplicate tests be consecutive and that the state establish that they occurred within ten minutes of each other—are trivial events.

¶16 Because DUI cases "are particularly susceptible of resolution by way of chemical analysis of intoxication" and because the test results "are virtually dispositive of guilt or innocence," our supreme court has long held that the state has an extraordinary duty in such cases to provide the suspect with equal access to that pivotal evidence. *Montano*, 149 Ariz. at 389-91, 719 P.2d at 275-77 (reviewing history of due process requirements for preservation of and access to evidence in DUI cases). We merely conclude, in conformity with our well-established jurisprudence, that if the state wishes to be relieved of the duty to

provide a defendant with access to the breath sample, it must comply with the conditions our legislature and courts have set for the relaxation of that traditional requirement.

¶17 In doing so we disagree with our dissenting colleague's characterization of the lack of compliance, as to the timing requirements, with the relevant statutes and DHS regulations as "nearly unavoidable." While it is true that Officer Eppley had no control over the test that was aborted due to radio frequency interference, he did maintain control over the length of time between the tests. And, there is absolutely nothing in the record to suggest that after the aborted test and successful third test he could not easily have administered a fourth test within ten minutes of the third. We also disagree with the dissent's characterization of our conclusion that the two breath tests were not consecutive as one of form over substance. As noted above, the state's own expert witness acknowledged the tests were not consecutive and "[bore] no resemblance" to the DHS regulations.

¶18 In short, because proper "duplicate" tests were not administered, Lyon was entitled to a sample of her breath for independent testing. *See Mack*, 196 Ariz. 541, ¶ 16, 2 P.3d at 105-06; *Moss*, 175 Ariz. at 353, 857 P.2d at 405. Such sample, of course, did not exist. Therefore, despite the purported accuracy of the machine used here and despite the fact that Lyon was apprised of her right to an independent test to determine her BAC, we cannot say the respondent erred in concluding her due process rights were violated.

Remedy for Due Process Violation

¶19 We turn now to the issue Lyon raises concerning the appropriate remedy in light of the respondent judge's conclusion that her due process rights had been violated. This is a question of law that we review de novo. *Mack*, 196 Ariz. 541, ¶ 6, 2 P.3d at 103. To the extent the resolution of this legal issue depends upon questions of fact, we defer to the city magistrate's factual findings, whether express or implicit; we will not disturb any such findings unless they are clearly erroneous. *See id.*

¶20 The respondent judge's order is, in our view, inconsistent. The due process violation was not confined to the charge under subsection (A)(2), which the respondent judge dismissed. It also affected the remaining charge under subsection (A)(1), for which the respondent ordered no relief. Lyon contends the (A)(1) charge should have been dismissed as well. But, under the circumstances of this case, we think Lyon's alternative remedy—a new trial at which the state will be precluded from introducing evidence of Lyon's BAC—is far more appropriate.

¶21 In *Mack*, this court discussed the appropriate remedy for a due process violation. In the three consolidated special actions in that case, the state had conceded in the city court that the Intoximeter RBT-IV used to test defendants' breath to determine BAC was unreliable. 196 Ariz. 541, ¶ 2, 2 P.3d at 103. The state had voluntarily dismissed the charges under (A)(2) and agreed not to offer the test results at trial to prove the remaining charge. *Id.* The defendants then moved to dismiss the charges under (A)(1), and the city magistrate

granted the motion. *Id.* ¶ 3. On appeal by the state to the superior court in two of the cases, the judge reversed the dismissal; on special action review to the superior court in the other case, the judge affirmed the dismissal. *Id.* In the consolidated special actions to this court that followed, we first examined the nature of the due process violation that occurred when the state used a machine later determined to be unreliable. *Id.* ¶ 17. We then addressed the appropriate remedy for the due process violation. *Id.*

¶22 As we noted, in only two cases had the courts of this state required dismissal of the (A)(1) charge in addition to dismissal of the charge under (A)(2): *Sanchez* and *Amos*. *Id.* ¶ 20. In the other cases, we noted that

> although the courts found that the state had violated the defendants' due process rights, they also found that suppression of the breath test results and dismissal of only the (A)(2) charges were sufficient sanctions for the violation. *Oshrin v. Coulter*, 142 Ariz. 109, 688 P.2d 1001 (1984) (suppression of test results and dismissal of (A)(2) charge constituted proper sanctions for due process violation in telling defendant charges had been dropped, so he did not have sample tested, and then refiling charges months later); *Scales v. Mesa City Court*, 122 Ariz. 231, 594 P.2d 97 (1979) (destruction of breath samples violated holding of *Brady v. Maryland*, 373 U.S. 83, . . . (1963), but required only suppression of test results); [*State v.*] *Vannoy*, [177 Ariz. 206, 866 P.2d 874 (App. 1993)] (state's failure to preserve defendant's deficient breath sample and introduction of test results at trial required new trial with suppression of results); [*State v.*] *Harrison*, 157 Ariz. [184,] . . . 185, 755 P.2d [1172,] . . . 1173 [(App. 1988)] (state's providing defendant "inherently" unreliable second sample required suppression of test results and dismissal of (A)(2) charge, not (A)(1) charge); *State v. Tucson City Court*, 130 Ariz. 285, 635 P.2d 878 (App. 1981) (state's failure to preserve breath sample required suppression of test results, not dismissal of charges).

Id. We then distinguished *Sanchez* and *Amos*. In *Sanchez*, we pointed out, the trial court had implicitly found the state had acted in bad faith by testing the defendant's breath "on a machine with a faulty repair record while knowing that the machine was unreliable." *Id.* ¶ 22. And we found *Amos* distinguishable because there the state had unreasonably interfered with the defendant's right to obtain an independent blood test by detaining the defendant for two hours while the officer "handl[ed]" an assault he had seen on the way to the hospital where the defendant had intended to have his blood drawn. *Id.* ¶ 21.

¶23 We concluded in *Mack* that, in the absence of any evidence that the state had acted in bad faith or had unreasonably interfered with the defendants' right to an independent test, the respondent judge who had reversed the city court magistrate's dismissal of the charges in two of the cases had ruled correctly and the judge who had affirmed the dismissal of the charges in the other case had erred. *Id.* ¶¶ 25-26. As we stated:

> Under the applicable case law, suppression of breath test results and dismissal of the (A)(2) charge is the appropriate sanction for the state's due process violation in using an unreliable primary or secondary testing device or in failing to preserve or properly preserve a test sample. Dismissal of the (A)(1) charge is required, however, only when the state, in addition, unreasonably or knowingly violates a suspect's rights, such as in voluntarily undertaking to participate in a suspect's obtaining of an independent blood test and then failing to make certain that the suspect obtains it, *Amos*, or in asking a suspect to submit to a breath test on a machine the state knows is unreliable or has a faulty repair record. *Sanchez*.

Id. ¶ 25.

¶24 Here, the city court magistrate did not find the state had acted in bad faith when it failed to obtain duplicate tests as that term is defined under the DPS regulations and then failed to provide Lyon with a sample of her breath for independent testing. Officer Eppley apparently believed he had administered consecutive tests no more than ten minutes apart. Therefore, although the respondent judge correctly found Lyon's due process rights had been violated, justifying the dismissal of the (A)(2) charge, he abused his discretion by affording Lyon no remedy for the violation with respect to the charge under (A)(1). The appropriate remedy, under the circumstances of this case, is to grant Lyon a new trial on that charge and preclude the state from introducing the results of the two breath tests. *See Mack*, 196 Ariz. 541, ¶ 25, 2 P.3d at 107-08.

¶25 For the reasons stated herein, we grant Lyon's petition for special action and grant relief, reversing the respondent judge's order and remanding this matter to the city magistrate for further proceedings consistent with this decision.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

E S P I N O S A, Judge, dissenting.

¶26 I respectfully disagree that any due process violation occurred in this case. The mere possibility that the replicate breath test occurred outside the ten-minute window,[3] and by only seconds to less than a minute through no fault of the investigating officer or the testing device,[4] is nothing like the situations in *Sanchez* and *Mack* upon which the majority relies to resurrect the ghost of breath-sample preservation. Both of those cases involved qualitatively different scenarios which are neither present nor analogous to this case. Indeed, both decisions addressed the significant problem of inherently unreliable evidence resulting from the use of a concededly inaccurate testing device. *See Mack*, 196 Ariz. 541, ¶ 2, 2 P.3d at 103; *Sanchez*, 192 Ariz. 454, ¶ 2, 967 P.2d at 130-31. That situation simply does not exist here in any form.

¶27 At the outset, some procedural issues raised by the majority must be addressed and placed in perspective. My colleagues complain of an insufficient record to support the trial court's determination that no due process violation occurred. They also assert that any

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[3]According to the state's toxicology expert, uncertainty about the precise test times arose because "there are no seconds indicated on either of the test record cards." It was established the first test occurred at 1:33 a.m. and the second at 1:43 a.m. The majority notes the second test "could have been administered" by as much as fifty-nine seconds beyond the prescribed ten-minute testing period; however, on this record it is just as likely the tests were administered within the test period with as much as fifty-nine seconds to spare.

[4]The record reflects that officer Eppley commenced a replicate test well within the appropriate ten-minute time period provided in DHS regulations but the arrival of a taxicab for Lyon caused radio interference in that attempt. The Intoxilyzer's own quality control mechanism caused it to stop that test and start over.

missing portions of the record must be presumed to support the respondent judge's opposite conclusion that due process was denied. But that is not the law. To the contrary, in the absence of a complete record, an appellate court assumes any missing portions of the record support the trial court's ruling. *See State v. Vasko*, 193 Ariz. 142, ¶ 12, 971 P.2d 189, 192 (App. 1998); *State v. Scott*, 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996) (incomplete trial record normally assumed to support trial court's judgment). More importantly, the record before us is quite adequate for a determination of the legal issue at hand. *See Piner v. Superior Court*, 192 Ariz. 182, ¶ 10, 962 P.2d 909, 912 (1998) (accepting jurisdiction when facts uncontested and legal issue could "properly be decided on the present record"); *Antonsen v. Superior Court*, 186 Ariz. 1, 4, 918 P.2d 203, 206 (App. 1996) (complete record not always required when issue is one of law).

¶28 The majority asserts "the state has failed to provide us with the record of the very evidentiary hearing at which Lyon urged that her due process rights had been violated" and suggests my dissent "rel[ies] on the parties' briefs." But that assertion fails to recognize that the trial transcript, provided by the state despite Lyon's neglecting to give us a complete record, reflects that Lyon expressly sought dismissal of her charges under *Sanchez* and *Baca* at trial, and she vigorously challenged the admission of the test results at that time on grounds the state's testing procedure had failed to comply with the DHS regulations and *Frye*.[5] After the state put on complete and detailed testimony about the investigation and testing

[5] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

procedure, whose essential facts are not disputed by the parties, the trial court admitted the evidence.[6] Whether a due process violation occurred on these undisputed facts is a pure question of law of the sort that is appropriate for our determination here. Finally, I must question the majority's unsupported position that the respondent judge's conclusion on appeal that a due process violation occurred is entitled to deference, yet the trial court's ruling to the contrary is not.

¶29 Putting procedural issues aside, the touchstone for due process in the context of breath and blood evidence is reasonable accuracy. As we observed in *Mack*,

> Because DUI cases "are particularly susceptible of resolution by way of chemical analysis of intoxication," and because the test results are "virtually dispositive of guilt or innocence," due process requires that the state ensure that the tests it demands drivers submit to produce *reasonably accurate results.*

196 Ariz. 541, ¶ 12, 2 P.3d at 104 (emphasis added), *quoting Montano v. Superior Court*, 149 Ariz. 385, 391, 389, 719 P.2d 271, 277, 275 (1986). In *Sanchez*, the state had relied on an "Intoximeter RBT-IV" breath-testing device that it later acknowledged was unreliable in calculating blood alcohol content. 192 Ariz. 454, ¶ 2, 967 P.2d at 130-31. Not only was the device inherently unreliable, but the state knew at the time that the specific machine used had been removed from service for repairs because of its tendency to produce erroneously high

[6] The record indicates, and the parties do not disagree, that the previous hearing was on the evidentiary question whether to automatically admit the breath test results pursuant to A.R.S. § 28-1323(A). Lyon then filed a motion to require the state to furnish a *Baca* sample, which the court denied.

readings. *Id.* ¶ 10. The state also knew the machine had been returned to service without any repair record or other indication that repairs had been made. *Id.*

¶30 Under those facts, this court did not hesitate to find a denial of due process. *Id.* ¶ 12. We recognized, however, that due process is satisfied "when the defendant is given a 'reasonably accurate' replicate breath test." *Id.* ¶ 7, *quoting State ex rel. Dean v. City Court*, 163 Ariz. 510, 514, 789 P.2d 180, 184 (1990). As the majority acknowledges, the court in *Moss* determined that the accuracy and reliability of the Intoxilyzer 5000, the same machine used in the present case, coupled with the statutory requirements of replicate tests, "virtually assured the test results would be accurate and the defendant would not be deprived of potentially exculpatory evidence." *See* 175 Ariz. at 353, 857 P.2d at 405.

¶31 In the other case relied upon by the majority, *Mack*, we reviewed convictions obtained through use of the same unreliable breath-testing device as in *Sanchez*, the RBT-IV, and pointed out that:

> Reliability is a due process issue only with respect to the state's testing. What the state may not do, however, is unreasonably interfere with a suspect's opportunity to obtain an independent test by holding a suspect incommunicado for the crucial period during which the suspect's alcohol, if any, dissipates; ignoring a suspect's request to post bail while knowing the suspect has sufficient immediately available funds to do so; unduly delaying a suspect's posting bail for release to obtain an independent test;

> or refusing to allow a suspect in custody to contact an attorney to arrange for an independent test.

196 Ariz. 541, ¶ 15, 2 P.3d at 105 (citations omitted).

¶32 Here, the state did not "unreasonably interfere with [Lyon's only] opportunity" to obtain potentially exculpatory evidence. *Id.* It did not hold her incommunicado, refuse to allow her to contact an attorney, or, most importantly, "test[her] on a machine that yielded inaccurate results." *Sanchez*, 192 Ariz. 454, ¶ 10, 967 P.2d at 132. In fact, Lyon was advised of her right to an independent test and was released at the scene. Therefore, there was no interference with her right to obtain any exculpatory evidence. Nor is there any evidence or indication that the possible slight enlargement of the ten-minute testing period somehow made the test results unreliable. To the contrary, the state introduced unrefuted evidence of the high accuracy and trustworthiness of the test as conducted and demonstrated the results could not have been affected by a negligible expansion of the test period,[7] if such an expansion even occurred. Thus, the majority's reference to the Intoxilyzer's accuracy as "purported" is somewhat perplexing.

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[7]The state's expert also testified that several states require the duplicate test to be performed within fifteen, rather than ten, minutes of the first, strongly supporting the trial court's implicit determination that the tests here, even if slightly outside the ten-minute period, were still accurate and reliable. *See Lum v. City of Brewton*, 883 So. 2d 241, 246 (Ala. Crim. App. 2003) (Alabama regulation requires testing second breath sample two to fifteen minutes after first sampling); *see also State v. White*, 351 S.E.2d 828, 830 (N.C. Ct. App. 1987) (replicate breath tests taken eleven minutes apart constituted admissible, "consecutively administered tests").

¶33 Also questionable are the majority's repeated references to the police toxicologist's acknowledgment that an enlargement of the ten-minute testing period would not comport with the applicable DHS regulation. That conclusion, which necessarily assumes the replicate test did actually occur outside the prescribed time frame, is hardly surprising, although its legal effect is minimal. *See State v. Angle*, 149 Ariz. 499, 504, 720 P.2d 100, 105 (App.) (facts, rather than officer's legal conclusion, are what is important), *vacated in part on other grounds*, 149 Ariz. 478, 720 P.2d 79 (1985); *see also Capitol Castings, Inc. v. Ariz. Dep't of Econ. Sec.*, 171 Ariz. 57, 60, 828 P.2d 781, 784 (App. 1992) (agency's interpretation of own rules, although persuasive, not binding on appellate court). The toxicologist's conclusion is also of only marginal relevance. The issue, of course, is not whether the regulation would be technically violated if the replicate test occurred just beyond the ten-minute time frame, but what impact such a violation would have on the fairness of the investigation and Lyon's due process rights.

¶34 The majority nevertheless concludes that a due process violation occurred, drawing a distinction between reliability of breath-test results and a defendant's "opportunity to conduct an independent test of the inculpatory breath sample," and reasoning that establishing the former does not dispense with the latter. But this rationale not only runs counter to acknowledged precedent, it employs dubious logic. As the majority acknowledges, the *Moss* court determined that, for the very reason that modern breath testing has developed to a point that "virtually assure[s] the test results would be accurate," the "defendant would not be deprived of potentially exculpatory evidence" when no independent

test sample was provided. *See* 175 Ariz. at 353, 857 P.2d at 405; *accord State v. Storholm*, 210 Ariz. 199, ¶ 13, 109 P.3d 94, 96 (App. 2005) (breath samples need not be preserved due to "advances in reliability and accuracy" of breath-testing methods); *State v. Bolan*, 187 Ariz. 159, 161-62, 927 P.2d 819, 821-22 (App. 1996) (due to "technological sophistication of the Intoxilyzer 5000" due process does not require preservation of breath sample).

¶35 The present situation exemplifies the foregoing principle and suggests a disconnect in the majority's reasoning. By establishing beyond question that the testing procedure here was accurate and reliable, the state fully satisfied the purpose of what the majority deems the "heightened requirements for admitting a test result" that for years now has obviated the need for preserving breath samples.[8] *See Storholm*, 210 Ariz. 199, ¶ 13, 109 P.3d 94 at 96; *Bolan*, 187 Ariz. at 161-62, 927 P.2d at 821-22; *Moss*, 175 Ariz. at 353, 857 P.2d at 405; *see also State v. Rodriguez*, 173 Ariz. 450, 455, 844 P.2d 617, 622 (App. 1992) (failure to provide breath sample as part of replicate-testing procedure does not violate right to gather exculpatory evidence). Stated differently, if the proven accuracy of the testing procedure in *Moss* and its progeny obviated the need for a preserved sample, while

[8]It should be noted that even under the "heightened requirements" standard articulated by the majority, the test for due process in this context is still reasonable reliability, not absolute precision. *See Mack*, 196 Ariz. 541, ¶ 12, 2 P.3d at 104 (due process requires that breath tests produce reasonably accurate results); *Sanchez*, 192 Ariz. 454, ¶ 7, 967 P.2d at 132 (due process requires "'reasonably accurate' replicate breath test"), *quoting Dean*, 163 Ariz. at 514, 789 P.2d at 184; *see generally Bolan*, 187 Ariz. at 161, 927 P.2d at ¶ 21 (App. 1996) ("'due process does not require the police to follow the most fair method; it only prohibits methods that are fundamentally unfair'"), *quoting State v. Velasco*, 165 Ariz. 480, 489, 799 P.2d 821, 830 (1990).

conforming with both the statutory scheme and the requirements of due process, why would the nearly identical procedure, utilizing the same testing device and established at trial as accurate and reliable, compel a different conclusion here?

¶36 The majority also points to the fact that the second attempt to test Lyon's breath was aborted, to characterize the two successful tests as "not truly consecutive." But that view truly elevates form over substance and ignores the important purpose of sequential breath testing: to ensure accuracy of breath testing results. *See* A.R.S. § 28-1324(2). Contrary to the majority's belief, the two completed tests were indeed consecutive to each other. The abortive interim attempt was cut short because of external radio interference. The machine itself stopped the test before Lyon had even been asked to blow into its mouthpiece; thus, the testing protocol was not actually engaged. That attempt collected no sample, yielded no result, and cannot be construed as a "test" under these circumstances. The interruption resulted from the automatic operation of an accuracy-ensuring safeguard, and the aborted procedure was a nullity, both factually and legally. This conclusion is consistent with our supreme court's observation that

> [s]everal factors may affect the accuracy of the Intoxilyzer test results: random error, radio frequency interference, mouth alcohol, chemical interference, insufficient alveolar samples, and operator error. However, the Model 5000 Intoxilyzer . . . has a number of mechanisms intended to guarantee the accuracy and reliability of test results. . . . Given these safeguards, . . . Intoxilyzer test results are considered extremely accurate.

State v. Velasco, 165 Ariz. 480, 485, 799 P.2d 821, 826 (1990). It is clear the aborted test here merely demonstrates that the machine's built-in mechanisms for ensuring reliability

were functioning properly. It makes little sense to construe that event as one causing the two successful tests, conducted within minutes of each other, to be nonconsecutive and therefore a "deviation" from the breath-testing regulations.

¶37 Although the question of what constitutes a "consecutive" test appears to have not been considered by Arizona's courts, the North Carolina court of appeals has addressed the issue under similar circumstances. In *State v. White*, 351 S.E.2d 828, 829-30 (N.C. Ct. App. 1987), involving a sequential, replicate breath-testing requirement much like Arizona's, the defendant argued that two automatically aborted breath tests that followed a completed first test caused the subsequently completed second test not to have been "consecutively administered" under the North Carolina statute. Therefore, he claimed, the test results were not admissible. In upholding the trial court's rejection of that theory, the appellate court reasoned:

> The purpose [of] requiring at least two tests is to ensure accuracy of the readings. *See* J. Drennan, *The Safe Roads Act of 1983: A Summary and Compilation of Statutes Amended and Affected by the Act* Ch. V, § A (1983). Sequential tests are required to minimize the time between tests. There are several factors beyond the control of either the accused or the breathalyzer operator which can affect the accuracy of the readings, such as body temperature of the accused, extraneous alcohol in the mouth of the accused, physical exercise or hyperventilation, even the humidity and barometric pressure in the testing room. *See generally* Mason and Dubowski, *Breath-Alcohol Analysis, Uses, Methods, and Some Forensic Problems*, 21 Journal of Forensic Sciences 9 (1976). Requiring sequential tests is one way of minimizing the effect these various factors could have on the accuracy of the breathalyzer readings by reducing the time between the two required samples.

> In the findings of fact made by the trial court below, the time of the first reading was 11:15 a.m., and the time of the second reading was 11:26 a.m. The first reading showed an alcohol concentration of .20 and the second showed a concentration of .19. Because these readings were taken from "consecutively administered tests" on adequate breath samples given within eleven minutes of one another, and because the readings are within .01 of one another, the statute requiring sequential testing was, in our view, complied with in this case.

Id. at 830; *accord Davis v. State*, 649 S.E.2d 568, 570-71 (Ga. Ct. App. 2007) (successful breath tests separated by failed test still "sequential").

¶38 Finally, the majority characterizes a potential, nearly unavoidable,[9] completely unintentional, and, if realized, negligible expansion of the ten-minute testing period as a failure to "comply with the conditions our legislature and courts have set for the relaxation of the traditional [breath-sample] requirement." But this assertion significantly overstates the requirements of A.R.S. § 28-1323 and disregards its underlying purpose. The majority draws support from *Fuenning v. Superior Court*, 139 Ariz. 590, 602, 680 P.2d 121, 133 (1983), for the proposition that the legislative goal in promulgating regulations for admissibility of breath-test results includes statewide uniformity. That is certainly true as far as it goes, but in *Fuenning*, our supreme court relied on statutory language expressly conditioning "validity" of a breath test on compliance with DHS regulations. 139 Ariz. at

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[9]My colleagues make much of the fact that Officer Eppley could have administered yet another test "within ten minutes of the third," while ignoring one obvious question. Why would he do that—subjecting Lyon to additional, unnecessary testing and prolonging the encounter for everyone at the scene—when the officer justifiably believed he had conducted the replicate test properly and successfully?

600-01, 680 P.2d at 131-32. Because there was "no evidence the test was performed according to methods 'approved by' DHS, as required by [former A.R.S.] § 28-692(G)" and only "arguable evidence" that the test operator was even qualified, the court found the breath test inadmissible. 139 Ariz. at 601, 680 P.2d at 132. The court therefore rejected the state's "substantial compliance" argument and strictly construed the statutory language and concomitant public policy of ensuring uniform standards throughout the state. *Id.* at 601-02, 680 P.2d at 132-33.

¶39 Not only are the facts in *Fuenning* nothing like those at hand, but in 1990, the legislature deleted the "validity" language from the statutory scheme. *See* 1990 Ariz. Sess. Laws, ch. 375, § 8. *Fuenning* therefore offers little support for the majority position, and it is notable the court did not foreclose substantial compliance from sufficing in other situations. Subsequently, in *State v. Duber*, 187 Ariz. 425, 428, 930 P.2d 502, 505 (App. 1996), this court found breath-test results admissible even though the state had not fully complied with DHS regulations relating to machine quality-assurance tests. We pointed out that, since *Fuenning* was decided, the legislature had revamped the statutory scheme and supplemented the foundational statute with a provision directing that compliance with its terms was sufficient for admission of breath-test evidence without more. 187 Ariz. at 427-28, 930 P.2d at 504-05; *cf. Rodriguez*, 173 Ariz. at 454, 844 P.2d at 621 (adoption of DHS

regulations "not critical to the admission of breath test results under subsection (A)" of § 28-1323). Here, as in *Duber*, assuming the state failed, albeit marginally, to comply strictly with a provision of the applicable DHS regulation, that requirement is not part of § 28-1323(A). More importantly, the state fulfilled both the letter and the spirit of the statute by properly administering the test and establishing that its results were accurate.

¶40 Due process is no mere catch-phrase or opportunity for a windfall to an accused; rather, it relates directly and pragmatically to the fairness to which all defendants are entitled at every stage of a criminal prosecution. *See State v. Melendez*, 172 Ariz. 68, 71, 834 P.2d 154, 157 (1992) (hallmark of due process under both federal and state constitutions is fundamental fairness). The majority unintentionally but effectively trivializes that bedrock principle of our jurisprudence by permitting it to turn on the mere fortuity of an arriving taxicab or, indeed, any other random event, be it an errant radio transmission or a disruptive sunspot, that could conceivably interfere with a reliable and properly administered testing procedure. Because the state demonstrated that the method utilized in investigating Lyon's suspected DUI was trustworthy, accurate, and fair, I would reinstate the sensible decision of the city trial court and uphold the convictions in this case.

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PHILIP G. ESPINOSA, Judge